

1  
2  
3  
4  
5  
6  
7  
8 UNITED STATES DISTRICT COURT  
9 SOUTHERN DISTRICT OF CALIFORNIA  
10

11 MALIBU MEDIA, LLC,  
12 Plaintiff,  
13 v.  
14 JOHN DOE - 66.27.82.184,  
15 Defendant.  
16

Case No.: 16-cv-0429-JAH-MDD

**ORDER GRANTING MOTION  
FOR EARLY DISCOVERY**

**[ECF NOS. 9, 12]**

17 Before the Court is Plaintiff's *Ex Parte* Motion for Leave to Serve a  
18 Third Party Subpoena Prior to a Rule 26(f) Conference. This Motion first  
19 was filed on March 18, 2016 and denied without prejudice on April 26, 2016,  
20 for failure to present evidence supporting Plaintiff's assertion that the  
21 subscriber of the subject Internet Protocol address likely resides within the  
22 jurisdiction of this Court. (ECF Nos. 4, 6). Plaintiff refiled the motion on  
23 June 24, 2016, but the motion package was missing Exhibit A to the  
24 Declaration of Brenna Erlbaum. (ECF No. 9). When notified of the  
25 discrepancy, Plaintiff filed the missing exhibit as a standalone documents  
26 without properly linking it to the Declaration. (ECF No. 10). Finally,

1 Plaintiff filed a complete package on July 12, 2016. (ECF No. 12). In  
 2 support of its renewed Motion, Plaintiff supplies the Declaration of Brenna  
 3 E. Erlbaum, which, including its attachment, cures the deficiencies noted by  
 4 the Court in its earlier Order. Accordingly, Plaintiff's Motion is  
 5 **GRANTED.**

## 6 7 I. LEGAL STANDARD

8 Formal discovery generally is not permitted without a court order  
 9 before the parties have conferred pursuant to Federal Rule of Civil  
 10 Procedure 26(f). Fed. R. Civ. P. 26(d)(1). "[H]owever, in rare cases, courts  
 11 have made exceptions, permitting limited discovery to ensue after filing of  
 12 the complaint to permit the plaintiff to learn the identifying facts necessary  
 13 to permit service on the defendant." *Columbia Ins. Co. v. Seescandy.com*,  
 14 185 F.R.D. 573, 577 (N.D. Cal. 1999) (citing *Gillespie v. Civiletti*, 629 F.2d  
 15 637, 642 (9th Cir. 1980)). Requests for early or expedited discovery are  
 16 granted upon a showing by the moving party of good cause. *See Semitool*,  
 17 *Inc. v. Tokyo Electron Am., Inc.*, 208 F.R.D. 273, 275-76 (N.D. Cal. 2002)  
 18 (applying "the conventional standard of good cause in evaluating Plaintiff's  
 19 request for expedited discovery").

20 "The Ninth Circuit has held that when the defendants' identities are  
 21 unknown at the time the complaint is filed, courts may grant plaintiffs  
 22 leave to take early discovery to determine the defendants' identities 'unless  
 23 it is clear that discovery would not uncover the identities, or that the  
 24 complaint would be dismissed on other grounds.'" *808 Holdings, LLC v.*  
 25 *Collective of December 29, 2011 Sharing Hash*, No. 12-cv-0186 MMA (RBB),  
 26

1 2012 WL 1648838, \*3 (S.D. Cal. May 4, 2012) (quoting *Gillespie*, 629 F.2d at  
2 642). “A district court’s decision to grant discovery to determine  
3 jurisdictional facts is a matter of discretion.” *Columbia Ins.*, 185 F.R.D. at  
4 578 (citing *Wells Fargo & Co. v. Wells Fargo Express Co.*, 556 F.2d 406, 430  
5 n.24 (9th Cir. 1977)).

6 District courts apply a three-factor test when considering motions for  
7 early discovery to identify Doe defendants. *Id.* at 578-80. First, “the  
8 plaintiff should identify the missing party with sufficient specificity such  
9 that the Court can determine that defendant is a real person or entity who  
10 could be sued in federal court.” *Id.* at 578. Second, the plaintiff “should  
11 identify all previous steps taken to locate the elusive defendant” to ensure  
12 that the plaintiff has made a good faith effort to identify and serve process  
13 on the defendant. *Id.* at 579. Third, the “plaintiff should establish to the  
14 Court’s satisfaction that plaintiff’s suit against defendant could withstand a  
15 motion to dismiss.” *Id.* (citing *Gillespie*, 629 F.2d at 642). Further “the  
16 plaintiff should file a request for discovery with the Court, along with a  
17 statement of reasons justifying the specific discovery requested as well as  
18 identification of a limited number of persons or entities on whom discovery  
19 process might be served and for which there is a reasonable likelihood that  
20 the discovery process will lead to identifying information about defendant  
21 that would make service of process possible.” *Id.* at 580.

## 22 II. ANALYSIS

23 Upon review of the motion and its supporting declarations, the Court  
24 finds Plaintiff has sustained its evidentiary burden and shown good cause to  
25 subpoena records from Time Warner Cable identifying the subscriber  
26

1 assigned to the subject IP address at the identified times. The subpoena  
2 must be limited to documents identifying the subscriber's name and address  
3 during the relevant period. That information should be sufficient for  
4 Plaintiff to be able to identify and serve Defendant. If Plaintiff is unable to  
5 identify and serve Defendant after receiving a response to the subpoena,  
6 Plaintiff may seek leave from the Court to pursue additional discovery.

7 The Court also must consider the requirements of the Cable Privacy  
8 Act, 47 U.S.C. § 551. The Act generally prohibits cable operators from  
9 disclosing personally identifiable information regarding subscribers without  
10 the prior written or electronic consent of the subscriber. 47 U.S.C. §  
11 551(c)(1). A cable operator, however, may disclose such information if the  
12 disclosure is made pursuant to a court order and the cable operator provides  
13 the subscriber with notice of the order. 47 U.S.C. § 551(c)(2)(B). The ISP  
14 that Plaintiff intends to subpoena in this case is a cable operator within the  
15 meaning of the Act.

### 16 III. CONCLUSION

17 For the reasons set forth above, Plaintiff's *Ex Parte* Motion for Early  
18 Discovery is **GRANTED**, as follows:

19 1. Plaintiff may serve a subpoena, pursuant to and compliant with  
20 the procedures of Fed. R. Civ. P. 45, on Time Warner Cable seeking only the  
21 name and address of the subscriber assigned to the subject IP address for  
22 the relevant time period.

23 2. The subpoena must provide at least forty-five (45) calendar days  
24 from service to production. Time Warner Cable may seek to quash or  
25 modify the subpoena as provided at Rule 45(d)(3).

26 3. Time Warner Cable shall notify its subscriber, no later than

1 fourteen (14) calendar days after service of the subpoena, that his or her  
2 identity has been subpoenaed by Plaintiff. The subscriber whose identity  
3 has been subpoenaed shall then have thirty (30) calendar days from the  
4 date of the notice to seek a protective order, to move to quash or modify the  
5 subpoena or file any other responsive pleading.

6 4. Plaintiff shall serve a copy of this Order with the subpoena upon  
7 Time Warner Cable. Time Warner Cable, in turn, must provide a copy of  
8 this Order along with the required notice to the subscriber whose identity is  
9 sought pursuant to this Order.

10 5. No other discovery is authorized at this time.

11 **IT IS SO ORDERED.**

12 Dated: July 13, 2016

13   
14 Hon. Mitchell D. Dembin  
15 United States Magistrate Judge  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26